Table of Contents.

	PAGE
Opinions Below	1
Jurisdiction	2
The Case Presented	2
Statement of the Case	3
Questions Certified	5
First Point:—The invoice value clause is invalid as an attempted limitation on the carrier's liability for negligence. The answer to the first question should be, no	5
Second Point:—The answer to the second question should be, no	25
Third Point:—The answer to the third question should be, yes	28
Appendix, Cummins Amendments	43

Table of Cases.

PAGE

Aetna Insurance Co. v. *United Fruit Co.*, 1938, 304 U. S. 430, 434 ..... 34, 38
Ansaldo v. *Rheinstrom*, 1935, 294 U. S. 494; 1933, 3 F. Supp. 579, 581 ..... 3, 4, 5, 6, 7, 8, 10, 11, 12 15, 17, 18, 20, 23, 25, 26, 27, 32, 42
Arnould on Marine Insurance 37, 40
Asuarca, The, 1924, 13 F. (2d) 222 17

Baltimore R. Co. v. *Oriental Oil*, 1908, 51 Texas C. A. R. 336 21
Bowman-Kranz Co. v. *Bush, Receiver*, 1920, 104 Neb. 165 ..... 18, 19
British Marine Insurance Act, 1906, Sec. 71(3) 36, 37
Brockman Co. v. *Mo. Pac. R. Co.*, 1916, 195 Mo. App. 607 18

Californian, The, 1936, 82 F. (2d) 283 ..... 15, 26
Chicago M. & S. Co. v. *McCaull-Dinsmore*, 1920, 253 U. S. 97 ..... 10, 11
Coleman v. *N. Y., N. H. & H.*, 1913, 215 Mass. 45 19

Davis, Director-General v. *Zimmern*, 1924, 211 Ala. 63 ..... 18, 19
Denver etc. R. Co. v. *Peterson Grocery*, 1915, 59 Colo. 125 18
Duplan Silk Co. v. *Lehigh Valley R. Co.*, 1915 223 Fed. 600 ..... 15, 17, 27, 32

Fahey v. *Baltimore & O. R. Co.*, 1921, 139 Md. 161 19
Ferncliff, The, 1938, 22 F. Supp. 728 ..... 1, 5, 25, 27, 28

G. R. Booth, 1898, 171 U. S. 450, 459 42
Grubbs v. *Atlantic C. L. R. Co.*, 1915, 101 S. C. 210 18

PAGE

Gulf C. & S. R. Co. v. *Texas Packing Co.*, 1917, 244 U. S. 31 ..... 10, 11, 12, 15, 26

Hadji, The, 1883, 18 Fed. 459 18
Hamilton v. *Pandorf*, 1857, L. R. 12 App. Case. 518 42
Hart v. *Pennsylvania R. Co.*, 1884, 112 U. S. 331 ..... 15, 26, 33
Harter Act, 46 U. S. C. sec. 190 5

Illinois R. Co. v. *Bogard*, 1900, 78 Miss. 11 21
Inman v. *Seaboard A. L. R. Co.*, 1908, 159 Fed. 960 16
International Navigation Company v. *Atlantic Mutual*, 1900, 100 Fed. 304 38

Judicial Code, Sec. 239 as amended by Act of 13th February, 1925, U. S. C. Title 28, Sec. 346 2

Kansas City &c. R. Co. v. *Carl*, 1913, 227 U. S. 639, 650 6

Lydian Monarch, The, 1885, 23 Fed. 298 18

Matter of Bills of Lading 1919, 52 I. C. C. 671, 710 ..... 16, 19
McConnell v. *Southern R. Co.*, 1907, 144 N. C. R. 87, 90 20
Merauke, The, 1929, 31 Fed. (2d) 974, 976 ..... 17, 25

Oneida, The, 1904, 128 Fed. 687 ..... 10, 15, 17, 26

Pearse v. *Quebec*, 1885, 24 Fed. 285 ..... 17, 18
Pennsylvania R. Co. v. *Olivit*, 1917, 243 U. S. 574 ..... 10, 15, 26
Phoenix Insurance Co. v. *Erie & Western T. Co.*, 1886, 117 U. S. 312 ..... 10, 11

PAGE

Rudolf on York Antwerp Rules, p. 102 35
Ruppel v. *Allegheny Valley R.*, 1895, 167 Pa. St. 166, 179 ..... 7, 20

St. Louis R. Co. v. *Coolidge*, 1904, 73 Ark. 112 21
Shaffer v. *Railroad Co.*, 1911, 21 I. C. C. 8 ..... 16, 19, 20, 23
Spada v. *Penn R. Co.*, 1914, 86 N. J. L. 187 19
Springfield Light, H. & P. Co. v. *Norfolk & W. R. Co.*, 1919, 260 Fed. 254 16
Straus v. *Canadian P. R. Co.*, 1930, 254 N. Y. 407 ..... 22, 23
Styria, The, 1900, 101 Fed. 728 ..... 17, 18

Union Pacific R. Co. v. *Burke*, 1921, 255 U. S. 317; 1917, 178 A. D. 783; 1919, 226 N. Y. 534 ..... 6, 7, 11, 13, 14, 20

Wallingford Bros. v. *Atchison*, 1917, 101 Kans. 544 ..... 18, 19
Western Transit v. *Leslie*, 1917, 242 U. S. 448 ..... 13, 29
Winter on Marine Insurance, p. 344 ..... 38, 39

Xantho, The, 1887, L. R. 12 App. Case. 504 41

York-Antwerp Rules, Rule 16 ..... 35, 37

Supreme Court of the United States

OCTOBER TERM, 1938.

H. V. B. SMITH, C. D. RAFFERTY and H. S. McCORMICK, co-partners trading as H. J. Baker & Bro.,
Appellants and Cross-Appellees,

against

Motorship *Ferncliff*, GLITTRA AKTIESELSKABET and FEARNLEY & EGER,
Appellees and Cross-Appellants.

No. 548.

BRIEF FOR APPELLANTS AND CROSS-APPELLEES.

OPINIONS BELOW.

The opinion and the supplemental opinion of the District Court of the United States for the District of Maryland are reported in 1938, 22 F. Supp. 728.

The Circuit Court of Appeals of the Fourth Circuit, after argument of the appeals certified to this court on 19th December, 1938, certain questions for decision. The case was docketed on the 28th December, 1938.

Jurisdiction.

The jurisdiction of this court is invoked under Section 239 of the Judicial Code as amended by Act of 13th February, 1925, U. S. Code, Title 28, sec. 346, which provides:

"In any case * * * in a Circuit Court of Appeals * * * the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause * * *".

The Case Presented.

The matter here involved arises out of a suit in admiralty to recover damages to shipments of fish meal on the Motorship *Ferncliff* in Japan and delivered to consignees in Norfolk, Va. and Baltimore, Md. in March, 1936. The damages were found to be negligently caused and the bills of lading to be subject to the Harber Act so that the carrier was not relieved from liability.

The certificate of the Court of Appeals states:

"Various questions have been raised by the appellants and cross-appellees in this case; but all but one of these have, in our opinion, been correctly decided by the court below for reasons adequately stated in the opinions of the District Judge. The remaining question, the extent of liability for cargo damage where the bill of lading contains a 'true valuation' clause based on invoice cost, is one of such importance that, in view of division of opinion with regard thereto in this Court, we feel that it should be certified to the Supreme Court for decision."

Statement of the Case.

The bills of lading for the cargo contain the following provision:

"All claims for which the ship and or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods."

No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him. No value was declared by the shipper.

The invoice value of the fish meal was $32.50 per ton. The value of the damaged portion of the fish meal at the time and place of delivery was $25.00 per ton and the market value of undamaged fish meal was $36.00 per ton.

The District Court held that the above quoted clause in the bill of lading was valid and computed the appellants' damages at the difference between the invoice value and the damaged value, or $7.50 per ton.

Appellants contended that the clause was invalid in principle, but that if valid, the computation of damages made by the District Judge was wrong under the principles announced by this court in *Ansaldo* v. *Rheinstrom,* 1935, 294 U. S. 494. It was urged that the invoice clause could be sustained only if the necessary computation of damages under it should be made by

ascertaining the percentage of damage to the goods and then applying that percentage to the invoice value. Such procedure was the only one that would never permit the carrier to escape altogether the consequences of its negligence. The percentage of loss should be found by taking the proportion which the actual loss of $11.00 per ton bore to the sound value of $36.00 per ton. This was 11/36 or 30.55%. By applying this percentage to the invoice cost of $32.50 per ton, the proper computation of damage was $9.92875 per ton instead of $7.50 as found by the District Judge.

The Court of Appeals said of this contention:

"It is pointed out that this is the method used in calculating the amount of loss under a valued marine insurance policy on cargo and also the method prescribed by Rule 16 of the York-Antwerp Rules for a general average adjustment. And it was stated at the bar of the court by counsel for appellant that the same method has been generally employed in estimating cargo damage since the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co. supra.*"

The amended certificate says that the statement of counsel was challenged by appellees' counsel.

The Court of Appeals further stated that in the absence of the decision in the *Ansaldo* case, they would affirm the decision below on the authority of certain cases that were cited, but they said:

"In view of that decision, however, we are divided and in doubt as to the validity of such a clause as is here involved and as to the method which should be employed in computing damages under it. * * * We, therefore, respectfully certify to the Supreme Court of

the United States the following questions of law as indispensable to a proper decision in this case:

1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?

2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

3. Or, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?"

FIRST POINT.

THE INVOICE VALUE CLAUSE IS INVALID AS AN ATTEMPTED LIMITATION ON THE CARRIER'S LIABILITY FOR NEGLIGENCE. THE ANSWER TO THE FIRST QUESTION SHOULD BE, NO.

It is fundamental that one who is under the obligations of a common carrier may not contract for complete nor for partial exemption from liability for the consequences of his negligence. *The Ansaldo San Giorgio I.* v. *Rheinstrom,* 1935, 294 U. S. 494. The carrier here was in a similar position, for the Harter Act prevented him from contracting against liability for negligence. *The Erncliff,* 1938, 22 F. Supp. 728, 737. The Harter Act is 46 U. S. C., sec. 190.

This court said in *Kansas City &c. R. Co.* v. *Carl*, 1913, 227 U. S. 639, at 650:

"An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration."

There is one exception to this rule and the exception is based on estoppel. A carrier may limit his liability for negligence to an agreed valuation where the shipper

"receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. The agreement as to value, in consideration of carriage at the lower rate thus obtained is held to estop the shipper from demanding damages in excess of the agreed value."

Ansaldo v. *Rheinstrom, supra,* at p. 497.

As this court said in *Union Pacific R. Co.* v. *Burke*, 1921, 255 U. S. 317, 321, 322:

"As a matter of legal distinction, estoppel is made the basis of this ruling that, having accepted the benefit of the lower rate, in common honesty conditions on which it was obtained * * *.

"Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception."

the shipper may not repudiate the

The invoice value clause in the present case does not fall within the scope of the exception referred to in the *Burke* case, *supra*. The certificate of the Circuit Court of Appeals states:

"No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him."

Furthermore, the clause in this case did operate to limit the carrier's liability for negligence. The actual damage, or difference between damaged and market value, was $11.00 per ton. The allowance by the District Court of the difference between the damaged value and invoice value was $7.50 per ton.

The remaining portion of the clause giving the carrier option of replacing any lost or damaged goods will be considered a little later.

The result in this case, where the market value at destination exceeded the invoice value, would represent the ordinary situation for as the court said in *Ruppel* v. *Allegheny Valley R.*, 1895, 167 Pa. St. 166, 179:

"The sole inducement to shipment of marketable commodities is the higher price at point of destination. This alone creates and stimulates international, interstate and domestic trade."

On principle, therefore, the invoice value clause in this case should be held invalid as a violation of the rule of law announced by this court in *Ansaldo* v. *Rheinstrom*, *supra*, at page 496, that a carrier "cannot contract for relief from liability for his own negligence," and p. 499, "Such an agreement is against

public policy as its effect is to relieve the carrier from the consequences of its negligence."

In the *Ansaldo* case, *supra*, this court, at p. 497, 498, refers generally to the fact that this court, and other courts, have decided cases where a bill of lading embodied a stipulation similar to the invoice value clause here. That case involved consideration of a bill of lading which provided:

"In the event of claims * * * the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred."

Barrels of cherries in brine had arrived partially damaged from improper stowage. Owing to favorable market conditions at destination, the market value of the entire shipment, sound as well as damaged, exceeded the values stated in the invoices. The District Court held that the clause was reasonable and denied recovery. This finding was reversed by the Circuit Court of Appeals and the latter's decision was affirmed here.

This Court said, p. 496, that two valuation clauses were in frequent use. One is a true limitation agreement, under which damages are computed in the usual way, but, if when so computed they exceed the agreed limit of value, no recovery of the excess may be had. Such valuation agreements were said not to be enforceable unless the shipper receives consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation.

The other type of clause was stated to be, p. 497:

"A true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment."

This court then discussed various decisions dealing with invoice value clauses in the federal and state courts, some upholding and other denying validity of the clause. It was said finally, however, p. 498:

"We have no occasion to determine the requirements or the validity of such a contract."

This statement was made because, on the facts in the case, the clause required, p. 499:

"That if, after deduction of all losses and damage, the remaining cargo, in its then condition, is worth more at destination than the whole cargo at place and time of shipment, the carrier shall be wholly exonerated."

It was accordingly held that such a clause was invalid because, p. 499:

"Such an agreement is against public policy as its effect is to relieve the carrier from the consequence of his negligence."

The first question in the certificate from the Court of Appeals of the Fourth Circuit now asks this court to determine the validity of an invoice value clause.

We have already shown that, in principle, the clause should be held invalid as it relieves the carrier, to some extent, from the consequences of its negligence. Indeed, if the damaged goods should equal the invoice

value, as might easily be the case, the clause, as applied by the District Court, would relieve the carrier altogether from the consequences of its negligence. In this state of affairs, the situation would be exactly the same as that presented in the *Ansaldo* case, although the clause here does not contain the words that the damages should be computed on the basis of the invoice value "of the entire shipment."

Further, there is not, in this case, any element of estoppel. There was not any choice of rates and there was not any consideration for the limitation on the carrier's liability.

Some of the authorities dealing with an invoice value clause were collated in the *Ansaldo* case, p. 498. They do not constitute precedents binding on this court to establish the validity of the clause in question.

This court said of some of those decisions:

"In some, the parties treated the clause as binding and no decision was made on the point."

Those cases were *Phoenix Insurance Co.* v. *Erie & Western T. Co.*, 1886, 117 U. S. 312; *Pennsylvania R. Co.* v. *Olivit*, 1917, 243 U. S. 574; *Gulf C. & S. R. Co.* v. *Texas Packing Co.*, 1917, 244 U. S. 31; *The Oneida*, 1904, 128 Fed. 687.

This court said of *Chicago M. & S. Co.* v. *McCaull-Dinsmore*, 1920, 253 U. S. 97, that the clause was held prohibited by the Cummins Amendment, 1915,* but the validity in cases not controlled by that enactment was not decided. The Cummins Amendment, 1915, provided in substance that the carrier "shall be liable * * *

* See Appendix.

for the full actual loss, damage or injury * * * notwithstanding any limitation of liability or limitation of the amount of recovery * * * in any such receipt or bill of lading." That amendment merely expressed the general rule of law that has frequently been announced by this court. See the *Burke* case, *supra*, p. 323, and the *Ansaldo* case, *supra*, p. 496.

This court said of the clause in the *McCaull* case, *supra*, p. 100:

"In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions * * *".

This court further said in the *Ansaldo* case, p. 498:

"In several cases there are expressions, not necessary to the decisions, to the effect that it is a reasonable and lawful provision for measuring damages."

The *Phoenix* case, the *Gulf* case and the *McCaull-Dinsmore* case were cited in support of that statement.

In the *McCaull-Dinsmore* case, however, the court while stating its understanding of the reasons in support of the clause, declared the clause was invalid as contrary to the plain language of the Cummins Amendment.

In *Phoenix* v. *Erie & Western*, *supra*, the point of the case concerned a clause in a bill of lading under which the carrier, when liable for a loss, should have the full benefit of any insurance on the goods. That

clause was held valid as between carrier and shipper. In a dictum, the court said, p. 322:

"So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination * * *".

This is not a holding that the stipulation in the bill of lading was lawful. The stipulation was not controverted and did not enter into the decision, as this court said in the *Ansaldo,* p. 498.

Nor can we find any suggestion in *Gulf* v. *Texas, supra,* that such a provision as is under discussion is a reasonable and lawful provision for measuring damages. The court said, p. 37, referring to the ordinary measure of damages:

"The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages."

It seems to have been assumed that this stipulation was valid. There is not anything to indicate that there was any discussion on the subject.

The next comment by this court in the *Ansaldo* case on the decisions dealing with invoice value clause was, p. 498:

"In none was there a decision that a choice of rates was essential to its validity, although there are indications of that view."

The cases cited are *Western Transit* v. *Leslie*, 1917, 242 U. S. 448, and the *Burke* case, *supra*.

The case of *Western* v. *Leslie* apparently did not involve an invoice value clause, but a provision in the railway's tariff and bill of lading was "Value not to exceed $100 per net ton." The bill of lading gave the consignor the option of shipping goods at a higher rate without limitation as to value in case of loss or damage. Twenty-five tons of copper ingots were shipped and about one ton was lost, the actual value greatly exceeding $100 per ton. The court said the clause fixed a ratio and not an arbitrary limit of recovery. The shipper was held entitled to recover not more than $100 a ton for each or any ton damaged or lost. The court said, p. 453:

"The release valuation clause in an interstate bill of lading when based upon a difference in freight rates is valid."

The validity of the clause, therefore, was supported by the choice of rates given in the bill of lading.

In the *Burke* case, *supra*, goods were shipped from Yokohama to New York. The bill of lading for ocean transportation to San Francisco and thence by railroad to New York, contained a provision that the liability of the carrier for loss of any of the goods should not exceed $100 per package. The uniform railroad bill of lading contained a provision:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight

charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occcurs from negligence."

It appears from the opinion in the Appellate Division, 1917, 178 A. D. 783, 784, that "the fair, reasonable and market value of the goods was $17,549.01, for which * * * the plaintiff demands judgment."

The invoice value apparently was the same amount. See *Burke* case, *supra*, p. 318. The goods were damaged in the hands of the railway carrier which sought to limit its liability to the sum of $100 per package as mentioned in the ocean bill of lading, claiming that that represented the agreed value mentioned in the clause above quoted from the railroad uniform bill of lading. The New York Court of Appeals declined to give effect to the limitation of $100 a package, saying, p. 542:

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of the agreed valuation limitation and relief from full liability. (Cincinnati, New Orleans & Texas Pac. Ry. *v.* Rankin, 249 U. S. 319, 327.)"

In the result the court gave judgment for the invoice value which was the full market value.

The judgment of the Court of Appeals was affirmed by this court, which said, p. 323:

"Having but one applicable published rate east of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the Uniform Bill of Lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner, would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made, only with the ignorant, the unwary or with persons deliberately deceived."

The certificate of the Court of Appeals in the case at bar cites *Gulf* v. *Texas, supra, Penn. R. Co.* v. *Olivit, supra, Hart* v. *Pennsylvania R. Co.*, 1884, 112 U. S. 331, *The Californian*, 1936, 82 F. (2d) 283, *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 1915, 223 Fed. 600 and *The Oneida, supra.* All these cases, except the *Hart* case, *The Californian* and the *Duplan Silk* case have already been considered.

Hart v. *Pennsylvania R. Co.* is not an invoice value case, but one where there was a limitation agreement supported by a choice of rates. See *The Ansaldo, supra*, p. 497.

In *The Californian, supra*, there was a form of invoice value clause and there was also a choice of rates.

In the *Duplan Silk* case, there was a limitation of liability to $1.00 a pound and also a choice of rates.

A few additional cases in the federal court were cited in the District Court's decision in the *Ansaldo* case, 1933, 3 F. Supp. 579, 581.

In *Inman* v. *Seaboard A. L. R. Co.*, 1908, 159 Fed. 960, there was a bill of lading clause that the value of goods lost or injured should be "computed on the value of the property at the place and time of shipment." It was held that such a clause was reasonable and had been sustained in other cases, but there was not any discussion on the subject. The court treated the case, pp. 968, 969, as one giving the shipper a choice of rates.

Springfield Light, H. & P. Co. v. *Norfolk & W. R. Co.*, 1919, 260 Fed. 254, came up on demurrer to a defense. The suit was against a common carrier for coal converted by the carrier. The railroad's coal tariff, filed with the Interstate Commerce Commission fixed the measure of damage "on the basis of the value of the property at the time and place of shipment". It was said that to permit the plaintiff to recover for a greater value than it should recover while paying the same rate as other shippers would be a discrimination and the demurrer was overruled. The case apparently was decided on the strength of the decision of the Interstate Commerce Commission in *Shaffer* v. *Railroad Co.*, 1911, 21 I. C. C. 8. That case supported the invoice value clause in the uniform railroad bill of lading as a convenience in settlement of claims. The Commission arrived at a different conclusion after the Cummins Amendments of 1915 and 1916,* and held that the clause was unlawful and void. *Matter of Bills of Lading*, 1919, 52 I. C. C. 671, 710. These amendments made the carrier liable for the full actual loss, notwithstanding any limitation of liability or the amount of recovery, except in the case of property concerning

* See Appendix.

which the carrier is authorized by law to establish and maintain rates dependent on the value of the property.

The Asuarca, 1924, 13 F. (2d) 222, was a decision in the Southern District of New York where a bill of lading clause provided that the carrier should indemnify for the actual intrinsic value of the goods loaded "ascertained from the invoices of origin or from valuation given by competent persons without being obliged to pay any indemnification for profits not made nor for increased valuation." The clause was upheld as a conventional valuation of the goods on the authority of the *Duplan Silk* case, *The Oneida* and *Pearse* v. *Quebec*, 1885, 24 Fed. 285.

The *Duplan Silk* case has already been distinguished. *The Oneida* is one of the cases where this court stated in the *Ansaldo* case, *supra*, that the parties treated the clause as binding and no decision was made on the point. The decision does not give any independent discussion on the validity of the clause.

In *Pearse* v. *Quebec*, the bill of lading provided

"In case of damage, loss or non-delivery, the shipowner will not be liable for more than the invoice value of the goods."

This is really a limitation clause and not a clause under which the damages are to be adjusted on the basis of the invoice value. The clause itself would be void under the decision of this court in the *Ansaldo* as there was not any choice of rates The construction of the clause and the computation of damages was overruled in the *Styria*, 1900, 101 Fed. 728, 735. See *The Merauke*, 1929, 31 F. (2d) 974, 976, which stated that such a clause was void without a choice of rates.

Two other federal cases are sometimes mentioned on this subject.

The Hadji, 1883, 18 Fed. 459, had a similar clause to that in *Pearse* v. *Quebec, supra*, and was also overruled in *The Styria, supra.*

The Lydian Monarch, 1885, 23 Fed. 298, in the District Court of New Jersey contained a clause similar to that in the *Pearse* case. The court said, p. 300:

"If it should turn out that the libelant has received from the sale of the damaged goods, the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed."

This decision is clearly contrary to the principles of the *Ansaldo*, for in the contemplated circumstances the carrier would escape all liability for the consequences of his negligence, although the invoice value clause did not contain the words "of the entire shipment."

The foregoing are substantially all the federal cases, so far as we can find, that are cited as supporting the principle of the invoice value clause here.

Nine cases in state courts were cited by the District Court in the *Ansaldo*, 1933, 3 F. Supp. 579, 581, as authority that the invoice clause, as it stood in that case, was valid. Those cases were: *Bowman-Kranz Co.* v. *Bush, Receiver*, 1920, 104 Neb. 165; *Davis, Director-General* v. *Zimmern*, 1924, 211 Ala. 63; *Wallingford Bros.* v. *Atchison*, 1917, 101 Kans. 544; *Grubbs* v. *Atlantic C. L. R. Co.*, 1915, 101 S. C. 210; *Brockman Co.* v. *Mo. Pac. R. Co.*, 1916, 195 Mo. App. 607; *Denver etc. R. Co.* v. *Peterson Grocery*, 1915, 59 Colo. 125;

Coleman v. *N. Y., N. H. & H.*, 1913, 215 Mass. 45; *Fahey* v. *Baltimore & O. R. Co.*, 1921, 139 Md. 161; *Spada* v. *Penn. R. Co.*, 1914, 86 N. J. L. 187. All these cases dealt with the clause in the railroad uniform bill of lading in use at that time and supported at that time by the decision of the Interstate Commerce Commission in *Shaffer* v. *Chicago, supra.*

In six of the cases there was not any discussion of the question whether the clause assumed to relieve the carrier from the consequences of his negligence.

In the *Bowman* case, the court merely said that "recent decisions seemed to hold" that the clause was not an attempt to limit the liability of the carrier for negligence and it was not void under the Cummins Amendment 1916. Reliance was placed on the *Shaffer* case although that was overruled in *Matter of Bills of Lading, 1919, supra,* and seems contrary to the clear language of the amendment.

In the *Wallingford* case, it was merely said "the provision is intended to establish a rule in determining the value of the property in the event of loss and not, as plaintiffs contend, to limit or diminish the carrier's liability." Reliance was placed on the *Shaffer* case, *supra.* In fact the effect of the provision was to limit or diminish the carrier's liability. The invoice price was less than the market price at destination.

In *Davis* v. *Zimmern, supra,* the court, referring to an earlier case in Alabama, merely stated that the clause "does not involve an exemption from liability on account of negligence." Reference was made to the *Shaffer* case.

If the foundation of the *Shaffer* decision is taken away from all these cases, it may well be doubted whether the clause would have been upheld. Certainly there is not anything in the cases which gives any reason that should weigh against the conclusions announced by this court in the *Burke* case, in the *Ansaldo* case and in the earlier decisions mentioned therein.

Cases in the state courts holding that such a clause is invalid where loss is occasioned by negligence of a carrier, include *Ruppel* v. *Allegheny, supra,* where a stipulation in a bill of lading that "the amount of any loss or damage shall be computed at the value of the property, at the place and time of shipment" was held invalid. The court said of the stipulation, p. 180:

"The condition is palpably a limitation of or reduction on the loss of the shipper. * * * The plain effect of it is, not alone the avoidance of inconvenience and uncertainty in the demand, but a restriction in the amount of it, a reduction in the real loss. It is therefore void."

McConnell v. *Southern R. Co.,* 1907, 144 N. C. R. 87, 90, involved negligent damage to a carload of melons shipped from Bamberg, S. C. to Philadelphia. The court declined to uphold a stipulation in the bill of lading that the measure of damages should be the value at the point of shipment. It was said, p. 90:

"The consignor ships to get the benefit of the market price at the place of destination, and a contract in cases of negligence that the damages shall be measured by the price at the place of shipment is *pro tanto* an agreement for partial exemption for the carrier's negligence, and is void."

Illinois R. Co. v. *Bogard,* 1900, 78 Miss. 11, was a suit for damages to livestock. The court said, p. 15:

"We now reannounce the true rule to be that a common carrier cannot validly contract for exemption from damages arising out of his own negligence, even to the extent of limiting his liability to account for values at the place of shipment."

St. Louis R. Co. v. *Coolidge,* 1904, 73 Ark. 112, was a suit for damages to a car of potatoes shipped on appellant's railroad and negligently damaged. The court declined to apply, p. 116, a clause in the bill of lading "that the value of the same at a point of shipment shall determine the measure in the event of loss of the goods." It was said, p. 117:

"Contracts restricting the liabilities imposed on carriers by law are only valid when fair and reasonable and upon a consideration, usually a reduced rate of freight, in consideration of the release from given legal liabilities."

Numerous decisions in Arkansas were cited and the court said, p. 117:

"These principles and authorities control, and without a consideration this clause of the contract is void."

Baltimore R. Co. v. *Oriental Oil,* 1908, 51 Texas, C. A. R. 336, was a suit for negligent loss of oil during transit on the railroad. The bill of lading provided "The amount of any loss or damage for which any carrier becomes liable shall be computed on the value of the property at the place and at the time of shipment under the bill of lading unless a lower value has been

agreed upon or is determined by the classification upon which the rate is based." The court said, p. 340:

"Under the law of this State, it seems clear that the stipulation in the bill of lading limiting appellant's liability to the value of the oil at the point of shipment is contrary to public policy and void."

Finally, in *Straus* v. *Canadian P. R. Co.*, 1930, 254 N. Y. 407, the New York Court of Appeals dealt with a case of theft of silk through negligence of the carrier where the bill of lading contained a provision "All claims * * * shall be adjusted upon the basis of the market value * * * at the place and time of original shipment unless the invoice or declared value of the said goods or property shall be less than such market value, in which case such invoice or declared value (whichever shall be the less) shall be the maximum, provided, however, that in no case shall the carriers be liable * * * beyond the sum of $10.00 per cubic foot nor in any case exceeding $100.00 for any one package, or any article not enclosed in a package unless a higher value shall have been declared in writing at the time of shipment and *ad valorem* freight paid thereon." The court said, p. 416, of this clause:

"The attempt to arbitrarily limit liability—to the value of the silk at the time and place of shipment in the event that the value was declared and an *ad valorem* rate paid, and otherwise to $100 per package—was without consideration. Under the wording of the bill of lading, the shipper could not, in any event, recover more than the value of the goods at the time and place of shipment, even though it placed a higher valuation thereon and paid an *ad valorem* rate. Such attempted

absolute limitation, of liability, regardless of the rate paid, makes the clause void."

The *Straus* case is said by the District Judge in the *Ansaldo* case to be "opposed to the great weight of authority". What the District Judge mentions as the great weight of authority consists of the decisions previously mentioned on the clause in the uniform railroad bill of lading which once was supported, but now is without support since the *Shaffer* case has been overruled.

It is fair to say, therefore, that the decisions in the state courts mentioned by the District Judge in the *Ansaldo* no longer constitute authority in support of the clause and that the remaining decisions in state courts, as mentioned above, are wholly in line with the decisions of this court which indicate that, under the circumstances of this case, such a clause is invalid.

The argument to support an invoice value clause is commonly put on three grounds:

1. As suggested by the court in *The Ansaldo,* p. 497, that the provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier and may lessen the carrier's normal liability if they should appreciate prior to that time.

2. The clause eliminates speculative elements in computing damages which might result from rise or fall in the value of the goods.

3. It is more convenient to use the invoice value than to ascertain the market for sound goods at destination.

None of these grounds seems sufficient to support the clause.

1. The depreciation would have to be so great as to reduce sound market value below invoice value to give the shipper any benefit. Perhaps such depreciation would be unlikely. In any event, the shipper would not have the opportunity which has been held essential in upholding a limitation agreement, of making a choice between having his goods carried at one rate with common law liability by the carrier or, at a lower rate, with restricted liability of the carrier. There would not be any basis for estoppel. Furthermore, in the particular clause in question, which gives the carrier the option of replacing any lost or damaged goods, the shipper would not benefit by the depreciation for the carrier could discharge his liability by buying similar goods at the depreciated market price.

2. Speculative elements of damages because of rise and fall in markets certainly were not eliminated by the way in which the clause was applied by the District Judge in this case and as it has commonly been applied. A fluctuation in the market with respect to sound goods also affects damaged goods and the deduction of damaged value from invoice value would give a result that varied with the fluctuation.

3. The argument of convenience rests on an assumption of difficulty in ascertaining market value at destination. No such difficulty normally exists. Certainly an argument of assumed, but doubtful convenience should not be permitted to override plain dictates of public policy which forbid a carrier to contract against liability for his negligence.

SECOND POINT.

THE ANSWER TO THE SECOND QUESTION SHOULD BE, NO.

The second question certified to this court asks whether, if the invoice clause is valid, the damages to a shipment should be ascertained by deducting the value of the damaged goods in their damaged condition at time and place of delivery, from invoice cost valuation as fixed by such a clause.

The District Judge assumed to differentiate the invoice value clause in the present case from that in the *Ansaldo* case, because the words "of the entire shipment" that occur there were omitted here. 1938, 22 F. Supp. 728, 742. The omission of those words might make a difference in some cases, but would not make any difference whatever where the value of the damaged goods should be equal to the invoice value. That situation might easily exist as a result of appreciation of the value of goods between the purchase of the goods and the arrival of the vessel at destination. Indeed, in *The Merauke,* 1929, 31 F. (2d) 974, the invoice cost of the lost cargo was $10,000, while its sound market value at destination when the ship arrived would have been over $33,000. Thus, if the situation in *The Merauke* case had existed in this case, the consignees would not have made any recovery at all on the computation outlined in the second question; for the actual extent of damage here was 30.55%.

Therefore, the construction outlined in the second question clearly violates the rule of the *Ansaldo* case that a carrier, p. 496, "cannot contract for relief from

liability for his own negligence" and p. 499 "such an agreement is against public policy as its effect is to relieve the carrier from the consequences of its negligence."

A construction cannot be permitted which would preclude recovery, if the damaged value should equal the invoice value of any unit, whether package, ton, or entire shipment.

It is immaterial that in this particular instance the damaged value of the goods was less than the invoice value. The construction given to the clause must be susceptible of uniform application. It is not permissible to compute damages under the clause in one way in a given situation and by a different method in a different situation.

The Court of Appeals in its certificate, says that in the absence of the decision in the *Ansaldo,* they would affirm the decision below on the authority of six cases cited in the certificate and already dealt with in this brief.

Of those cases, *Hart* v. *Pennsylvania R. Co.,* as stated by this court in the *Ansaldo,* was a limitation case and not an invoice value case. This decision is frequently referred to in other cases in connection with the computation of damages as if it were an invoice value case or what is called in the *Ansaldo,* a true valuation clause.

Of the other cases, this court in the *Ansaldo,* p. 498, said that *Gulf* v. *Texas, Pennsylvania* v. *Olivit* and *The Oneida* were instances where "the parties treated the clause as binding and no decision was made on the point." The same statement is true of *The Californian.*

The only remaining case cited is *Duplan Silk Company.* That case perhaps is better discussed in the next point.

In none of the foregoing cases, nor indeed in any of the other cases dealing with invoice value, and computation of damages thereunder, is there any discussion or apparent consideration of the point that where the damaged value equals or exceeds the invoice value, the carrier would be completely exonerated from the consequences of his negligence. Under the principle of the *Ansaldo* and other cases, that point should be fatal to the computation of the damages in the manner indicated in the second question.

Furthermore, the computation of damages outlined in the second question certainly does not eliminate the "variable factor of the market value" as suggested by the District Judge in this case, 1938, 22 F. Supp. 728, 744, nor can it be said that "it guards the parties against fluctuations in the market while the goods are in transit" as suggested by the District Judge in *The Ansaldo,* 1933, 3 F. Supp. 579, 581. Fluctuations of the market are not eliminated by substituting the invoice value for the market value of sound goods at destination in computing damages in any case of partial loss.

If the market rises after the date of sailing, the value of the damaged goods may equal the invoice value and, therefore, preclude recovery. If the market value of sound goods falls below the invoice value after the date of sailing, the depreciation will be reflected in the value of the damaged goods and the carrier will then have to pay much more than he should pay. Thus,

although the extent of physical damage to the goods might be exactly the same in the two instances, the amount payable by the carrier would vary according to the fluctuations in the market. Such a result would defeat what is said to be the purpose behind the clause.

THIRD POINT.

THE ANSWER TO THE THIRD QUESTION SHOULD BE, YES.

The third question certified to this court asks, on the assumption that the invoice valuation clause is valid, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?

It is submitted that the procedure outlined in this question, which may be described as the percentage method, is correct in principle and the only method that in all situations will give the consignee a recovery proportionate to the loss he sustains and will never permit the carrier to be relieved from the consequences of his negligence.

The percentage of actual damage is easily ascertained and it is by no means necessary, as the District Judge suggested, 1938, 22 F. Supp. 728, 744, to resort in all cases to the factor of market value.

In numerous cases it is possible for experts to decide by inspection of damaged cargo that the depreciation amounts to 50% or some other stated proportion.

In such cases the ascertainment of market value is quite unnecessary.

Similarly, if the invoice value of a package containing a dozen identical pieces should be $120 and one piece should be destroyed, the cargo owner would be entitled to recover 1/12th or 8⅓% of the invoice value without regard to the market value.

So, also, there may be instances where a number of bags or packages are damaged. If the invoice value is in a lump sum and some of the packages are worthless, the percentage represented by those packages is taken of the invoice value and there need never be any reference to the market value.

Thus, in *Western Transit Co.* v. *Leslie,* 1916, 242 U. S. 448, where the value of copper ingots was stated in the bill of lading not to exceed $100 a ton, the court said, p. 454, "The valuation clause fixes not an arbitrary limit of recovery but a ratio." The case was sent back for the computation of damages accordingly.

In many instances, however, as in the present case, the ascertainment of the extent of damage must be the result of comparing the price the damaged goods will bring with the price they would have brought, if sound.

By whatever means the percentage of damage is obtained, the shipowner's liability is adjusted by applying the percentage of loss to the invoice cost. The cargo owner will be entitled to recover and the shipowner will be required to pay only a given amount for the same percentage of loss, whether the market value for sound goods has risen or fallen and whether the value of the damaged goods is less or more than their invoice value.

Commonly shipments of cargo are made a considerable period of time after the contracts have been made for the purchase of the goods and the invoice price has been fixed. Thus there is usually a very substantial spread of time before the arrival at port of destination and there is opportunity for considerable fluctuation in value.

The operation of the percentage, or true rule as compared with the ordinary measure of damages or the method of computation in the court's second question, may be seen from the following examples where there has been respectively a fall in market and a rise in market after the purchase of the goods which determines the invoice valuation.

1. The case of a fall in market value.

Assumed values per ton: invoice $32.50; market for sound goods on arrival $25.00; damaged value $22.00.

a. Normal measure of damages.

Sound value	$25.00	per ton
Damaged "	22.00	" "
Actual loss	$ 3.00	" "

b. Computation of damages under Question 2.

Invoice value	$32.50	per ton
Damaged "	22.00	" "
Recovery	$10.50	" "

c. Percentage or true rule of computation under Question 3.

Sound value	$25.00	per ton
Damaged "	22.00	" "
Actual loss	$ 3.00	" " or 12%

Recovery: 12% of invoice, $32.50, or $3.90 per ton.

2. The case of a rise in market value.

Assumed values per ton: invoice, $32.50; market for sound goods on arrival, $40.00; damaged value $35.20.

a. Normal measure of damages:

Sound value	$40.00	per ton
Damaged "	35.20	" "
Actual loss	$ 4.80	" "

b. Computation of damages under Question 2.

Invoice value	$32.50	per ton
Damaged "	35.20	" "
Recovery	None	

c. Percentage or true rule of computation under Question 3.

Sound value	$40.00	per ton
Damaged "	35.20	" "
Actual loss	$ 4.80	" " or 12%.

Recovery: 12% of invoice, $32.50 or $3.90 per ton.

Thus it will be seen that on the computation under Question 2 the consignee would receive $10.50 per ton when the market for sound goods fell, although the consignee's actual loss was $3.00 per ton, and would receive nothing at all when the market rose, although the actual loss was $4.80 per ton.

Under the percentage or true rule, however, as the percentage of loss was the same in both cases, the consignee would recover $3.90 per ton in each case. This would be somewhat more than actual loss when the market fell and somewhat less than actual loss when the market rose. The effect of market fluctuations would be entirely eliminated.

This rule also meets the suggestion in the *Ansaldo,* p. 497. that

"Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time."

Duplan Silk v. *Lehigh Valley R. Co.,* 1915, C. C. A. 2d, 223 Fed. 600, mentioned in the certificate in this case, is referred to as an authority against the application of the percentage method of determining damages under an invoice value clause.

One clause in the bill of lading was printed, and it was the clause of the uniform railroad bill of lading, *supra,* p. 13. Another clause was stamped on the bill of lading as follows:

"Liability limited to $1.00 per pound. The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case

of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable because of the lower rate thereby accorded for transportation."

The "specified value" or the "value represented in writing by the shipper" in this case was $1.00 per pound. The Court of Appeals considered that there was no substantial difference between the ideas expressed in the two clauses and said, p. 604:

"When, however, the valuation fixed is intended to express the agreed value of the goods, the carrier will be liable for the difference only between the damaged value and the agreed value. *Hart* v. *Penn. R. R.*, 112 U. S. 331; *Bachman* v. *Clyde S. S. Co.*, 153 Fed. 403; *Hohl* v. *Norddeutscher Lloyd*, 175 Fed. 544; *Pierce* v. *Wells Fargo Co.*, 189 Fed. 561. As in all other controversies arising upon written contracts, the fundamental question is what does the contract provide? That the method of calculation provided may not be as equitable as the method of calculation provided under some other contracts—*e. g.*, under policies of marine insurance—is not important. The question is whether the parties have agreed on that method."

The court then assumed that the parties had agreed on a method of calculation consisting only of the difference between the damaged value and the agreed value, but nothing is indicated in the facts to show that the parties did agree to any such method.

The *Hart* case and the other cases cited by the court were all cases of limitation and not of valuation and they do not furnish any authority for the method of

determining damages in a valuation case followed by the Court of Appeals. It will be observed that the court apparently conceded that the percentage method, which is the one followed under policies of marine insurance, was a more equitable method of calculation of damages.

The court does not seem to have considered, and certainly does not mention, the circumstance that the method actually followed would, whenever the damaged value equalled the agreed value, relieve the carrier altogether from the consequences of his negligence.

There seems no more reason why a valuation clause in a bill of lading should operate as an estoppel or preclude proof of actual value than is the case with a valuation clause in a policy of marine insurance. This court said in *Aetna Insurance Co.* v. *United Fruit Co.*, 1938, 304 U. S. 430, 434, when speaking of a marine insurance policy:

"We think that the valuation clause in its usual form does not operate as an estoppel or by agreement to foreclose proof that actual value exceeds agreed value when the question is of the insurer's right to subrogation. The application of the agreed value to the insurance adjustment does not depend upon estoppel. * * *"

P. 435, "In the case of partial insurance of cargo under a valued policy the insured is treated as a co-insurer and is allowed to recover on the policy only such proportion of the loss as the insured value bears to the actual value, a computation which necessarily requires proof of the actual value in order to establish the co-insurance relationship."

The true rule above mentioned is the principle that is stated in Rule 16 of the York Antwerp Rules 1924 dealing with General Average. That rule states:

"Amount to be made good for cargo lost or damaged by sacrifice.—The amount to be made good as General Average for damage to or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure where this ends at a place other than the original destination.

"Where goods so damaged are sold after arrival, the loss to be made good in General Average shall be calculated by applying to the sound value on the date of arrival of the vessel the percentage of loss resulting from a comparison of the proceeds with the sound value on the date of sale."

This rule was adopted at Stockholm at the meeting of the International Law Association on 8th September, 1924.

Rudolf in his book on the York Antwerp Rules, p. 102, says:

"It is claimed by the advocates of this method that it provides a perfect solution of the difficulties inherent in the other methods. In the first place, any variation in the amount of loss caused by the sacrifice owing to the rise or fall of the market before date of sale, is excluded by a comparision of the proceeds with the sound value on the date of sale. The percentage of loss so arrived at is then applied to the sound value which the owner of the goods would have realised had he not been deprived of them by reason of the sacrifice, and the result thus more nearly approximates to the true meaning of the rule where it provides that the

amount to be made good 'shall be the loss which the owner of the goods has sustained thereby, *based on the market values at the date of the arrival of the vessel.*' It is a method, moreover, very familiar to anyone conversant with the calculation of claims under a contract of marine insurance, where the percentage of loss arrived at by a comparison of the proceeds with the sound value on date of sale is first ascertained and then applied to the insured value. Instead of the insured value, which is only relevant of course where a claim under a policy is concerned, the value which the owner of the goods would have realised had they arrived sound is adopted as the basis for calculating the loss to be made good in General Average. The method has the advantage that however long the delay may be in arranging the sale, and whatever the fluctuations in market may be after arrival, the actual loss in value 'which the owner of the goods has sustained' through the sacrifice is correctly ascertained, and the amount of compensation is then 'based on the market values at the date of the arrival of the vessel.' "

The same rule is followed in computing loss under a valued policy in marine insurance.

The *British Marine Insurance Act 1906,* Sec. 71 (3) provides:

"Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value."

The reference to market value in the York Antwerp Rules and sum fixed by the policy in the British Marine Insurance Act would mean the invoice value in the present case.

See also *Arnould on Marine Insurance,* p. 1314, where, speaking of particular average where an owner's property has been deteriorated by damage, it is said:

"and such owner, if insured, has a claim against his underwriter in proportion, 1st, to the degree by which the damage sustained may have diminished the value to him of the property insured; 2nd, to the sum which the underwriter by the policy has agreed to insure on such property.

"Whatever percentage this deterioration may amount to on the value which the property would otherwise have sold for, that same percentage the underwriter is bound to pay to the assured, upon the sum for which, by the policy, he has agreed to stand insurer.

"For instance, if goods which have been insured for 500L., would have realized in the market to which they were being sent 1,500L., but for the occurrence of a particular average loss, which prevents them from selling there for more than 1,200L., it is plain that these goods have been deteriorated to the extent of 300L., or one-fifth of the value they would otherwise have realized: the underwriter, in such case, is not bound to repay the assured 300L., or the whole amount of the actual loss sustained, but only 100L., or a fifth part of the sum for which the goods were insured * * *."

The percentage rule in this country with respect to insurance on goods is similar to the statement in the British Marine Insurance Act and to the provision of

Rule 16 of the York Antwerp Rules 1924. The subject was discussed by Judge Brown in *International Navigation Company* v. *Atlantic Mutual,* 1900, 100 Fed. 304. The case is frequently referred to as the *St. Paul.* The court first discussed the rule with respect to insurance on hull where in case of partial damage recovery was allowed of the damage up to the insured amount. At p. 324 Judge Brown said: "With goods or freight the case is different." The court then considers certain examples covering both rise and loss in market and says:

"Neither the insurer nor the assured should gain or lose from such accidental circumstances. These elements should, therefore, be eliminated; and this may be done by taking the proportion of loss to the sound value as ascertained by a sale at the place of discharge, and then taking that same proportion of the policy value, which will give the amount to be paid by the insurers pro rata, reckoning the owner as constructive insurer for any uninsured part of the policy value."

The policy value in a valued policy takes the place of the invoice value.

The difference between hull policies and cargo policies is explained by this court in *Aetna Insurance Co.* v. *United Fruit Co.,* 1938, 304 U. S. 430, 435.

The rule is stated also in Winter on Marine Insurance at p. 341, where it is said:

"The adjustment of a particular average caused by damage, however, is more difficult, and is determined by ascertaining the percentage of depreciation on the goods. This is done by comparing their gross sound value with their gross damaged value as fixed

in the open market. When this percentage is found, it is applied to the insured amount under the policy and settlement of loss is made accordingly. There is added to this sum whatever expenses may have been incurred in connection with the settlement of the loss. It will be pertinent at this point to direct attention again to the fact that, in marine insurance, unlike ordinary fire insurance, the underwriter is merely a coinsurer of the property with the assured if the latter has not insured his property in full, and a particular average, no matter how small, will be adjusted by applying the percentage of depreciation to the amount insured on the damaged property."

The analogy between the policy value in marine insurance and the invoice value as a basis of computing damages in a bill of lading seems to be very close. The valuation is inserted in the valued policy and in the bill of lading for the same purpose. The insurer and the carrier are alike indemnitors with respect to loss computed on the valuation. In each instance an endeavor is made to avoid the uncertainty of fluctuations in market value and to stabilize the basis of recovery. In both instances the first inquiry is the percentage of damage. In determining such percentage reference is sometimes made to the sound market value as compared with the damaged value. Sometimes the market value is not actually considered, but a percentage of damage is ascertained perhaps by reference to the quantity damaged as compared with the quantity that is sound. That procedure is commonly followed where it is feasible to determine a physical percentage of the damage. Sometimes the percentage of loss is determined by agreement. *Winter*

on Marine Insurance, 344. When the percentage is ascertained, then that percentage is taken of the insured value under the policy or the invoice value under the bill of lading clause.

Reference to market value, which is occasionally made to ascertain the percentage of loss in order to determine the damages payable under a valued policy or under a valid invoice value clause, does not disregard the finality of the value in the policy or the invoice value clause in adjusting damages. Some extrinsic means must always be employed to determine, in the first instance, the actual loss as distinct from the damages which may have to be paid. Reference to market value may be merely the most convenient extrinsic means.

Arnould says of a valued policy, Sec. 340, p. 478:

"Of course, in the case of the goods being partially damaged, the policy alone can never show what the underwriter ought to pay; for the amount due from him is the same percentage on the sum he has agreed to insure, as the damage which the goods have suffered is upon their value; in other words, the proportion of the whole sum insured which the underwriter has to pay in case of loss, must depend upon the proportion in which the goods are damaged: as the one sum cannot be ascertained without fixing the other, and as the damage the goods have sustained can never be made out except by calculations wholly extrinsic to the policy, every policy, whether open or valued, must in this sense be opened in every case of average loss.

"Opening the policy, then, in this sense, means nothing more than resorting to extrinsic evidence, in order to ascertain the amount of damage sustained by the subject insured, so as to fix one element in calculat-

ing the amount of indemnification to which the assured is entitled; it is, in fact, merely ascertaining the percentage of damage sustained by the thing insured."

We submit indeed that there is not any distinction in principle between the ascertainment of loss under a valued policy and computation of damages under a bill of lading containing an invoice value clause such as is found here.

It might well be that of two shipments of the same commodity one would be insured at its invoice value and the other would not be insured. In case of damage, the receiver of the goods would compute his loss and claim against the underwriter on the well-recognized percentage basis. It seems altogether proper that the receiver in proceeding against the shipowner on the uninsured parcel should compute the damages with respect to the invoice value in exactly the same way that the loss would be computed against the underwriters. Both the policy and the invoice value clause in the bill of lading merely specify a value on the basis of which settlement is to be made. It has long been decided that a similar construction should be given to similar language in a policy of insurance and in a bill of lading.

Thus in the *Xantho*, 1887, L. R. 12 App. Case, 503, Lord Herschell in considering whether there was any difference between the words "perils of the sea" in a bill of lading and in a policy of insurance, said, p. 510:

"It would in my opinion be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words in two maritime instruments."

Lord Macnaghten said, p. 517:

"Whatever the expression 'perils of the sea' means in a policy of insurance, it means neither more nor less in a bill of lading."

See also *Hamilton* v. *Pandorf*, 1857, L. R. 12 App. Case, 518, where Lord Watson said, p. 526:

"The expression has precisely the same significance in both cases."

And Lord Bramwell said, p. 527:

"I am of opinion that 'perils of the seas' is a phrase having the same meaning in bills of lading and charter parties as in policies of insurance."

See also the *G. R. Booth*, 1898, 171 U. S. 450, 459.

We submit that it has been shown that any construction other than the true rule above mentioned may result in relieving the carrier wholly from the consequences of its own negligence in causing damage and that is something which this court said in the *Ansaldo* case cannot be permitted.

Respectfully submitted,

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January, 1939.

APPENDIX.

Cummins Amendments 1915 and 1916 of Interstate Commerce Act. Act of Mar. 4, 1915, 38 Stat. 1196; Act of Aug. 9, 1916, 39 Stat. 441; 49 U. S. C. §20(11).

1915. "Any common carrier, railroad or transportation company subject to the provisions of this chapter receiving property for transportation * * * shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company * * * shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, * * * for the full actual loss, damage or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission and any such limitation without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void * * *".

1916. "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property * * * concerning which the carrier shall have been or shall be expressly authorized or required by order of

the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *".